



Office of the City Manager

REVISED AGENDA MATERIAL for Supplemental Packet 1

Meeting Date: September 15, 2020

Item Number: 12

Item Description: Civil Enforcement of Face Covering Orders; Amending BMC Section 2.55.040

Submitted by: Paul Buddenhagen, Deputy City Manager

The correct BMC section is 2.50.040. In places in the report and ordinance where that has been incorrectly referenced it has been changed to 2.50.040.

The initial Code Section in B. of the Ordinance was incorrectly input as Section 20175. It incorrectly read...authority granted under Health and Safety Code Sections 20175 through 120250.

It has been corrected in the revised Ordinance below to the proper section: 120175.

ORDINANCE NO. -N.S.

*URGENCY ORDINANCE: CIVIL ENFORCEMENT OF HEALTH OFFICER ORDERS;
AMENDING BERKELEY MUNICIPAL CODE SECTION 2.50.040*

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 2.50.040 is amended to read as follows:

2.50.040 Rule and regulation adoption authority.

A. _____ The Director of Health, Housing and Community Services, subject to the approval of the City Manager, shall have authority to adopt rules and regulations for

the prevention of disease and the promotion of health in the City. (Ord. 7227-NS § 1 (part), 2012)

B. The City of Berkeley Public Health Officer shall have authority to adopt rules, regulations, and orders pursuant to the authority granted under Health and Safety Code Sections 120175 through 120250.

1. The Health Officer and their designees shall have authority to enforce all such rules, regulations, and orders. Violation of any order issued by the Health Officer shall be subject to administrative citation under Chapter 1.28.

2. The City Manager may, upon request of any person receiving a citation under this Paragraph, waive the requirement to pay an administrative penalty upon a demonstration that payment of the penalty would result in undue financial burden or hardship. The person requesting a waiver of the administrative penalty must demonstrate that the condition leading to the violation of the Health Officer order has been corrected.

Section 2. Vote Required, Immediately Effective

The Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley and must therefore go into effect immediately. This Ordinance shall go into effect immediately upon a seven-ninths vote of the City Council, in satisfaction of the Charter of the City of Berkeley.

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Paul Buddenhagen, Deputy City Manager
Subject: Civil Enforcement of Face Covering Orders; Amending BMC Section 2.50.040

RECOMMENDATION

Adopt an urgency ordinance amending Berkeley Municipal Code Section 2.50.040 to authorize the City of Berkeley Public Health Officer or her designee to issue administrative citations for violation of a Health Officer order.

SUMMARY

The Berkeley City Council appoints a local public health officer to enforce provisions of the California Health and Safety Code related to public health within the City, and in particular, provisions related to the control of infectious disease. The City's Health Officer has authority to issue orders to enforce isolation or quarantine measures, or to close or restrict public assemblies or gatherings, require evacuation, examination, inspection, vaccination, decontamination, disinfection, property destruction or commandeering, and to compel assistance in the provision of public health services.¹

Under state law, violation of a Health Officer order is a misdemeanor.² However, state law provides no civil mechanism for the enforcement of local health officer orders.

The proposed ordinance seeks to create an alternative means to enforce orders of the Berkeley Health Officer through an administrative citation process. Any person violating a Health Officer order could be subject to a civil penalty of up to \$100 per day for the first violation under the City's existing administrative citation policy, with penalties increasing for repeat violations.³

Even with passage of the Ordinance, City staff would continue to focus primarily on achieving voluntary compliance with Health Officer orders. However, the availability of a civil enforcement mechanism would provide City Code Enforcement, Environmental Health, and other personnel a more practical enforcement mechanism in the event that education and outreach fail to achieve acceptable public health outcomes.

¹ See Health & Safety Code § 120175; [Health Officer Practice Guide for Communicable Disease Control in California](#), pp. 4-5.

² Health & Safety Code §120275,

³ Administrative Citation Handbook (Oct. 2008), p. 2.

In order to mitigate the potential for an unfair impact on people suffering financial hardship, the proposed ordinance would include a provision that allows the City Manager to waive administrative penalties upon demonstration of financial hardship.

BACKGROUND

Since March 17, 2020, City of Berkeley Public Health Officer Dr. Lisa Hernandez has issued a series of orders seeking to limit the spread of COVID-19 within the City, including orders limiting public gatherings and activities (“Shelter in Place”), requiring the wearing of face coverings, and regulating certain licensed care facilities.⁴ The Health Officer has broad authority to issue orders to prevent the spread of communicable disease under the California Health and Safety Code.⁵

In most cases, Berkeley residents have voluntarily complied with the requirements of the Health Officer orders. Voluntarily compliance is reinforced through education and outreach conducted by the Public Health Division, Emergency Operations Center staff, or other City employees.

The proposed ordinance addresses the relatively infrequent instances in which education and encouragement are insufficient to achieve compliance with the Health Officer’s orders. In those cases, the City’s enforcement options are presently limited to criminal prosecution under the Health and Safety Code or, in cases of violations by a business, an order shutting down the business to correct violations.

The proposed ordinance would provide the Health Officer or their designee an additional and more effective mechanism for addressing non-compliance with Health Officer orders. The proposed ordinance would authorize the Health Officer or their designee to issue administrative citations to persons or entities who violate a Health Officer order, thereby providing a civil remedy for correcting noncompliance by individuals and businesses.

Administrative citations would be issued under the existing provisions of Chapter 1.28 of the Berkeley Municipal Code and the policies in the City’s Administrative Citation Handbook. Individuals and businesses could be cited up to \$100 per day for a first-time violation, with penalties escalating to \$500 per day for repeat violations.⁶ Persons receiving citations would have the right to appeal the citation to an administrative hearing officer.⁷

To mitigate the potential for an unfair and disparate impact on people with low incomes, the proposed ordinance includes a provision that allows the City Manager to waive the

⁴ See <https://www.cityofberkeley.info/covid-19/>.

⁵ See Health & Safety Code § 120175; [Health Officer Practice Guide for Communicable Disease Control in California](#), pp. 4-5.

⁶ Administrative Citation Handbook, p. 2.

⁷ BMC § 1.28.060.

assessment of an administrative penalty upon a demonstration of hardship. The applicant for a hardship waiver would be required to demonstrate that the condition leading to the violation of the Health Officer order has been corrected.

Staff recommends that the City Council adopt the proposed ordinance to provide the Health Officer and their designees with an effective mechanism for the civil enforcement of Health Officer orders when voluntary compliance cannot be obtained. The Ordinance would provide an efficient enforcement mechanism that avoids unnecessary criminalization of community members' conduct and would reinforce existing education and outreach efforts surrounding COVID-19 that emphasize the importance of social distancing, the wearing of face coverings, and hygiene measures.

FISCAL IMPACTS OF RECOMMENDATION

There is no direct fiscal impact associated with the proposed ordinance. However, staff anticipates that additional resources from the Code Enforcement Unit, the Environmental Health Division, and potentially other departments or divisions will be necessary to ensure adequate enforcement of the Health Officer orders, including issuing administrative citations where appropriate. The reassignment of City staff to enforce Health Officer orders will impact their ability to perform their other duties.

ENVIRONMENTAL SUSTAINABILITY

The proposed order would not have a significant impact on the environment.

RATIONALE FOR RECOMMENDATION

Amendments to BMC Section 2.50.040 are necessary to provide a civil enforcement tool to address violations of Health Officer orders when education and outreach efforts fail to result in voluntary compliance. Further, immediate passage of an urgency ordinance is necessary to address the imminent risk to public health and safety posed by the COVID-19 pandemic.

ALTERNATIVE ACTIONS CONSIDERED

Staff considered existing mechanisms for enforcing Health Officer orders (principally misdemeanor prosecution), but determined that those tools are generally impracticable and risk leading to the unnecessary criminalization of conduct that is more appropriately addressed through a civil remedy.

CONTACT PERSON

Erin Steffen, Assistant to the City Manager 981-7017

Attachments:

1: Ordinance: Proposed BMC Section 2.50.040